No. 10,303

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WASHINGTON BREWERS INSTITUTE, REGAL AMBER BREWING COMPANY, WILLIAM P. BAKER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

REPLY BRIEF ON BEHALF OF APPELLANTS, ACME BREWERIES AND KARL F. SCHUSTER.

NORMAN A. EISNER,
Mills Building, San Francisco,
Attorney for Appellants,
Acme Breweries and Karl F. Schuster.

Subject Index

Table of Authorities Cited

Texts

No. 10,303

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WASHINGTON BREWERS INSTITUTE, REGAL AMBER BREWING COMPANY, WILLIAM P. BAKER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

REPLY BRIEF ON BEHALF OF APPELLANTS, ACME BREWERIES AND KARL F. SCHUSTER.

APPELLEE CONCEDES THAT TO THE EXTENT THAT THE STATE HAS LEGISLATED CONCERNING DELIVERY INTO, OR USE WITHIN, SUCH STATE OF INTOXICATING LIQUORS, SUCH LEGISLATION IS PARAMOUNT, AND TO THE EXTENT THEREOF, INTOXICATING LIQUORS HAVE BEEN REMOVED FROM INTERSTATE COMMERCE AND THE JURISDICTION OF FEDERAL LAWS, THE APPLICATION OF WHICH IS DEPENDENT UPON INTERSTATE COMMERCE.

Appellee does not dispute that the State laws are paramount and that to the extent of State legislation intoxicating liquors have ceased to be an article of

interstate commerce. The Federal Government retains jurisdiction only to the extent that the field of regulation has not been occupied by the State. To the extent of inconsistency the Federal law is superseded. Almost the entire burden of appellee's argument is in answer to the contention urged by certain appellants that since the Twenty-first Amendment intoxicating liquors have been entirely removed from the domain of interstate commerce and Federal law founded upon the commerce clause of the Constitution.

We start, therefore, with the major premise of our argument conceded by appellee. The following questions remain:

1. Does an indictment lay the foundation for Federal jurisdiction and state an offense under the Sherman Act by simply alleging that intoxicating liquors were shipped interstate?

2. In view of the Twenty-first Amendment does an allegation of interstate shipment constitute an allegation of interstate commerce, and place upon the defendants the burden of defining the extent to which intoxicating liquor remains a subject of interstate commerce?

3. Are the acts with which the defendants are charged authorized by State laws?

THE INDICTMENT DOES NOT ALLEGE THE EXISTENCE OF INTERSTATE COMMERCE.

The "nature and extent of * * * commerce involved" is defined by paragraph 15 (Tr. p. 16) of the indictment. The only allegation is that beer in substantial quantities has been shipped interstate.

Federal jurisdiction depends on interference with interstate commerce. The monopoly and restraint denounced by the Act are the monopoly and restraint of interstate and international trade or commerce. Unless the acts charged constitute a direct and substantial burden on interstate commerce, an indictment under the Sherman Act will not lie. Interstate commerce is an essential ingredient of the offense. It is conceded that an indictment to be sufficient must clearly and accurately define every ingredient of the offense. Appellants maintain that in the case of intoxicating liquor, the indictment must, in addition to the fact of interstate shipment, allege that the acts charged were not done under the authority of the laws of any State governing the delivery into or use therein of intoxicating liquor. Appellee contends, very briefly and inadequately as we shall show, that the allegation of interstate shipment is sufficient and that the existence of State laws must be set up by way of defense.

It is apparent that, in view of the fact that State laws are paramount, it is entirely consistent that all the facts alleged in the indictment may be true and yet no offense exist and the Federal Court not have jurisdiction.

> "If the facts alleged may all be true and yet constitute no offense, the indictment is insuffi-

cient. * * * Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty."

27 *Am. Jur.*, p. 621;

Fleisher v. United States, 302 U. S. 218, 82 L. Ed. 208;

United States v. Standard Brewery, 251 U. S. 210, 64 L. Ed. 229.

"Every ingredient of which the offense is composed must be accurately and clearly alleged."

United States v. Cook, 17 Wall. 174, 21 L. Ed. 539.

It cannot, "be left in doubt or to mere inference, from the words of the indictment, whether the offense charged was one within Federal cognizance."

Blitz v. United States, 153 U. S. 308, 38 L. Ed. 725, 728;

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Since the enactment of the Twenty-first Amendment, the Sherman Act has by implication contained an exception that may be paraphrased as follows:

"Except, however, that in the case of intoxicating liquor, nothing done under the authority of the laws of any State governing the delivery into or use therein of intoxicating liquor, shall come within the scope of this Act or constitute a violation thereof."

It was necessary for the indictment to negative this implied exception both to define an essential ingredient of the crime and to establish the jurisdiction of the Federal Court in which the indictment was brought. As all restraints and burdens upon interstate shipments of beer do not violate the Sherman Act, the indictment must show that the restraints and burdens in question come within Federal jurisdiction. Interstate shipments ordinarily constitute interstate commerce, the regulation of which is vested in the Federal Government. Where, however, as in this case, interstate shipment alone does not make beer an article of interstate commerce, there must be additional allegations that serve to positively bring it within that category.

The mere fact that the charge concerns beer makes the bare allegation that there have been interstate shipments insufficient to establish Federal jurisdiction. Federal jurisdiction will not exist *unless* consistent with State legislation.

Appellee by its heading (p. 36) suggests that the burden is on the defendant to ascertain what, if anything, charged in the indictment comes within Federal jurisdiction. According to appellee, everything will be assumed to be within Federal jurisdiction and not covered by authorization of State law, unless the defendants affirmatively establish the contrary. This is unsound. Jurisdiction of a Federal Court is never presumed. It must be clearly and distinctly alleged. Facts must be pleaded, which, if true, will positively establish jurisdiction. Jurisdiction cannot be left to

conjecture, inference or presumption. An allegation of interstate shipment of beer is in and of itself wholly inadequate to lay a foundation for Federal jurisdiction. An added factor is necessary. An indictment that does not set forth the existence of this added factor is insufficient.

In *Brown v. Keene,* 8 Pet. 115, Chief Justice Marshall said:

> "The decisions of this Court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from the averments."

In *Robertson v. Cease,* 97 U. S. 646, 24 L. Ed. 1057, the Supreme Court said:

> "As the jurisdiction of the Circuit Court is limited, in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears."

See also

Mattingly v. N. W. Virginia R. R. Co., 158 U. S. 53, 39 L. Ed. 894.

Courts of the United States are of limited jurisdiction. "Jurisdiction cannot rest on mere inference, conjecture or argument but it must appear, in accordance with the rules of good pleading, by positive averment and specific allegations of fact which show clearly

and distinctly that a question under a Federal law is involved, and that the question is an essential or integral part of the case."

35 *C. J. S.* 913.

In order to support Federal jurisdiction under the Anti-trust Statute, it is essential that the acts complained of involve interstate commerce. The conclusion is inevitable that all facts necessary to establish interstate commerce must be affirmatively pleaded.

Appellee (p. 36) quotes an extract from 27 *Am. Jur.* 668, which is not in point. It has reference to the necessity of negativing an affirmative defense such as the Statute of Limitations. The only case relied upon by the text for the statement made is *United States v. Cook,* 17 Wall. 168, 21 L. Ed. 538. This case holds that where all of the ingredients of the crime are set forth in the indictment, it is sufficient and the Statute of Limitations cannot be availed of by demurrer. The Court took pains to indicate that every essential ingredient to establish the crime must be contained in the indictment:

> "Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within the exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed."

The case of *United States v. Hutcheson,* 312 U. S. 219, 85 L. Ed. 778, cited by appellee (p. 37) has no bearing. The Court in that case held that the facts pleaded determine whether a crime is stated, irrespective of the particular statute that the pleader conceived had been violated. Likewise, in determining whether or not a crime has been stated, the Court will consider all pertinent Federal statutes. Concretely, in an indictment against labor unions for violation of the Sherman Act, the Court held that it would take into consideration the Norris-LaGuardia Act, which placed a congressional interpretation on Section 20 of the Clayton Act. Statutes need not be pleaded, but jurisdictional facts and all ingredients of the crime must be pleaded.

Appellee states that if required to allege the absence of State laws, it would be necessary to prove the allegation and the manner of proof would be "interesting". It is always necessary to plead jurisdictional facts and essential ingredients of the offense. Difficulty of proof does not eliminate this requirement. Furthermore, it is no more difficult for the prosecution to prove what the State laws cover and authorize than for the defendants.

THE ACTS CHARGED ARE AUTHORIZED BY STATE LAWS.

Appellee contends that as the indictment charges a combination among distributors of beer to fix the prices at which they will sell the commodity, it charges something in violation of the Sherman Act and not

authorized by State laws. The indictment does something more. It sets forth the specific manner by which the conspiracy was to be effectuated. The general allegation is limited by the specific means.

United States v. Great Western Sugar Co., 39 Fed. (2d) 149.

If the necessary effect of State regulations is an elimination of competition and the establishment and maintenance of uniform prices for beer, it cannot be a crime to combine or conspire to attain such necessary effect by compliance with such regulations. The object as well as the means have been made lawful.

At this point we would like to refer to a recent decision by the Supreme Court, *Parker, etc. v. Brown,* Law Edition Advance Opinions, Vol. 87, No. 6, page 235. This case involved raisins, a normal subject of interstate commerce. The question was the validity of State legislation that authorized restraints, artificial price fixing and enforced price adherence in connection with raisins, peculiarly an article of interstate commerce, in a manner and to an extent wholly inconsistent with the Sherman Act. The validity of the legislation was upheld.

> "The California Agricultural Prorate Act authorizes the establishment, through action of State officials, of a program for the marketing of agricultural commodities produced in the State, so as to restrict competition among growers and maintain prices in their distribution of their commodities to packers * * * It clothes the committee with power and imposes on it the duty to control marketing of the crop so as to enhance

> the price or at least to maintain prices by restraints on competition of producers in the sale of their crop. The program operates to eliminate competition of the producers in the terms of sale of their crop, including price. And since 95% of the crop is marketed in interstate commerce, the program may be taken to have a substantial effect on the commerce in placing restrictions on the sale and marketing of the product to buyers who eventually sell and ship it in interstate commerce. * * *
>
> We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a State or its officers or agents from activity directed by its legislature. * * *
>
> But they (State regulations) are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress."

In the case of beer, the supreme law of the land has established that local regulation, whatever its effect or extent, shall be paramount. It is clear that if the necessary effect of State regulation is the enhancement and maintenance of uniform prices and elimination of competition, a conspiracy to enhance and maintain prices and eliminate competition by compliance therewith, cannot be held to be criminal under the Federal law.

Appellee appears surprised that the State should by regulation authorize the price of beer to be raised, fixed, stabilized and controlled. While the object and purpose of the State in eliminating competition in the case of intoxicating liquor is not the same as in eliminating competition in the case of raisins, the reason is equally sound. The consumption and use of intoxicating liquor must not be inordinate; the public demand must not be whipped up or incited by low and competing prices; the fear is not that the public will buy too little but that it will buy too much.

An analysis of the State laws and regulations discloses a clear intent to maintain and enforce price uniformity and to render it impossible for a dealer to obtain an advantage by reduction in price or allowance of concessions. Prices must be publicly announced well in advance of becoming effective, and if any price posted should constitute a reduction, it may forthwith be met by any other dealer. Sellers are forced to agree upon or accept a certain level of prices and adhere to them. A necessary result of following out the directions of the State laws cannot be illegal.

The nature of the subject-matter makes this case unique. The public is protected against the evils resulting from competition, instead of being guaranteed the benefits of freedom of competition. There is no analogy between the case at bar and *Keogh v. Chicago N. W. Ry. Co.*, 260 U. S. 156, 67 L. Ed. 183. (Appellee's Br. p. 29.) The filing of schedules of rates with the Interstate Commerce Commission for approval is to insure reasonableness of rates and nondiscrimination.

Posting of prices in the case of beer is one of a group of regulations calculated to eliminate competition and maintain uniformity of price.

CONCLUSION.

It is respectfully submitted that the indictment is insufficient and the demurrer thereto should be sustained.

Dated, San Francisco,
April 9, 1943.

Respectfully submitted,
NORMAN A. EISNER,
Attorney for Appellants,
Acme Breweries and Karl F. Schuster.